Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

RICHARD LEE CARLISLE and
RONALD ADAIR PARRISH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RICARDO NICOL, ESQ.
400 West Fourth Street
Second Floor
Santa Ana, CA 92701
(714) 550-6644
Member of the Bar
Supreme Court of the
United States

ROGER S. HANSON, ESQ.*
1517 East Fourth Street
Santa Ana, CA 92701
(714) 953-0638
Member of the Bar
Supreme Court of the
United States

**Counsel of Record*
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a Federal Grand Jury empanelled in the Central District of California can return an indictment against prospective federal defendants for crimes that were never committed within the Central District of California, within the meaning of the Fifth Amendment to the United States Constitution?

2. Whether, under the 6th Amendment to the United States Constitution, can venue for a federal prosecution ever be predicated in the Central District of California where no element of any federal crime occurred, and where if any crime occurred, it occurred in the Republic of Korea via communications into a District of Virginia?

3. Whether it was, and is, *plain error* for this prosecution to have been set in California following a federal indictment that failed to allege any crime occurring in the Central District of California?

4. Whether a United States Circuit Court can ignore a defense raising of the plain error rule under F.R. Crim. P. 52 in its second opinion in this case?

5. Whether, within the meaning and provisions of *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005) (5 Justice opinion of the Hon. John Paul Stevens), can a United States District Court adhere to an 8-level increase in a federal sentence based upon a failure to indict upon, and require a federal jury to find, beyond

QUESTIONS PRESENTED - Continued

a reasonable doubt, that "Colonel Moran was involved in the defense within the meaning of U.S.S.G. 2C1.7(b)(1)(B) (2003)" "because Moran was an official holding a high-level decision-making or sensitive position"?

6. Whether the decision of the United States Supreme Court in *Cunningham v. California*, 549 U.S. ___ (2007) reinforces and requires that the rule of *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005) (5 Justice Opinion of the Hon. John Paul Stevens) *requiring Blakely* be applied to the federal U.S.S.G.?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable John Roberts, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

> Richard Lee Carlisle and Ronald Adair Parrish, petitioners, seek a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the ruling/opinion entered May 1, 2007, rehearing/suggestion for rehearing En Banc denied June 22, 2007.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered its unpublished opinion, *United States v. Carlisle & Parrish*, on May 1, 2007. A timely petition for rehearing/suggestion for hearing En Banc was denied on June 22, 2007. Copies of these opinions and orders appear in the Appendix, Exhibit "C" and "D".

JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals affirmed the conviction by an unpublished opinion entered May 1, 2007. A copy of that opinion appears at Appendix "C".

(ii) The United States Court of Appeals entered an order denying rehearing/suggestion for hearing

En Banc on June 22, 2007. A copy of that appears at Appendix "D".

(iii) Jurisdiction to review by certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1254.

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FIFTH AMENDMENT, U.S. CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT, U.S. CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL RULE OF CRIMINAL PROCEDURE 52:

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

STATEMENT OF THE CASE

Petitioners Parrish and Carlisle assert several deprivations of due process of law in this Petition for Writ of Certiorari to the United States Court of Appeals for the 9th Circuit.

A. Nature of the case, course of proceedings, and disposition in the District Court

Petitioners Ronald Adair Parrish ("petitioner Parrish") and Richard Lee Carlisle ("petitioner Carlisle") seek certiorari concerning convictions for conspiring to disclose and obtain contractor bid or proposal information, in violation of 18 U.S.C. § 371, and for aiding and abetting the disclosure of contractor bid and proposal information, in violation of 41

U.S.C. § 423 and 18 U.S.C. § 2(a), following a jury trial before the Honorable Alicemarie H. Stotler, United States District Judge.

On July 3, 2002, a federal grand jury in the Central District of California returned an eleven-count indictment against petitioners Parrish and Carlisle, and then co-defendants Richard J. Moran, Gina Cha Moran, and Joseph K. Hur, charging them with violations of 18 U.S.C. § 371 (conspiracy; counts one and ten), 41 U.S.C. § 423 (disclosure of procurement information; count eleven), 18 U.S.C. § 201 (bribery; counts two through five), 18 U.S.C. § 1956(h) (money laundering conspiracy; count six), 18 U.S.C. § 1957 (engaging in monetary transactions in property derived from unlawful activity; counts eleven and eight), 18 U.S.C. § 1512 (obstruction of justice; count nine), and 18 U.S.C. § 2(a) (aiding and abetting). Petitioners Parrish and Carlisle were only named in counts ten and eleven, which charged conspiracy to disclose and obtain contractor bid or proposal information, in violation of 18 U.S.C. § 371 (count ten), and with disclosing procurement information, and aiding and abetting that disclosure, in violation of 41 U.S.C. § 423 and 18 U.S.C. § 2(a) (count eleven). Counts 10 and 11 become counts 1 and 2 in a redacted indictment. The redacted indictment is set forth as Exhibit "A" to this petition.

On July 3, 2002, co-defendant Joseph K. Hur was arrested, and made his initial appearance on the charges. On July 4, 2002, co-defendant Richard J. Moran was arrested in Los Angeles, California on the

charges alleged in the indictment, and made his initial appearance the following day.

Also on July 4, 2002, petitioner Parrish was likewise arrested in Los Angeles, and made his initial appearance the following day. On July 8, 2002, petitioner Richard L. Carlisle was arrested in Indiana on the charges alleged in the indictment. No criminal action charged in this Indictment, Appendix "A", occurred in the Central District of California.

Prior to trial, co-defendants Richard J. Moran, Gina Cha Moran, and Joseph K. Hur all pleaded guilty pursuant to agreements with the government.

On March 25, 2003, the government provided the district court and petitioner's counsel a redacted indictment renumbering counts ten and eleven as counts one and two. See Appendix A.

The case against petitioners Parrish and Carlisle proceeded to trial on March 25, 2003. On March 27, 2003, the government rested. Petitioners moved for an acquittal on March 27, 2003, which the district court denied. On March 28, 2003, the jury began deliberations. On that same day, the jury returned guilty verdicts against Petitioners Parrish and Carlisle on both counts in the indictment.

On August 11, 2003, the district court sentenced petitioner Parrish to 18 months imprisonment, supervised release for three years, and a special assessment of $200, and petitioner Carlisle to 24

months imprisonment, supervised release for three years, and a special assessment of $200.

At no point in the district court proceedings did petitioners claim that venue was improper in the Central District of California. At issue is the Plain Error Rule of Federal Rule of Criminal Procedure 52.

B. Statement of Facts

1. *The Offense Conduct*

The United States Army has a command located in the Republic of Korea whose job it is to acquire goods and services to support the Army's mission in Korea. That unit, called the United States Army Contract Command Korea ("USA-CCK"), is staffed by military personnel and civilians. The lead military officer at USA-CCK between 2000-2001 was then co-defendant Richard J. Moran, a colonel in the U.S. Army. Petitioner Ronald Parrish served as Chief of the Contract Support Division during that same time.

During his tenure working for the Army, petitioner Parrish received training regarding how the Army handles procurements. As part of that training, Parrish learned that proposals submitted by contractors interested in performing work for the Army must be kept confidential. This training included instruction on the Procurement Integrity Act.

One contractor performing work at USA-CCK was AMS located in Virginia. AMS authored a software program for the Army which provided the Army

with a standardized method for conducting its procurements. From 2000-2001, AMS had a contract with USA-CCK to provide support for running that software package in Korea. Petitioner Richard Carlisle was the AMS employee on-site in Korea performing that contract for AMS. He was paid from AMS, located in the United States in Virginia. The contract was due to expire in September 2001.

Before AMS's contract expired, USA-CCK determined that it would solicit other interested parties to bid on a new contract for computer support services. Petitioner Parrish served as USA-CCK's point of contact concerning bids for the new contract in his capacity as chief of the Contract Support Division.

AMS expressed interest in receiving the next year's contract. Toward the end, Kim Stewart of AMS engaged, from Virginia, in discussions and e-mails with petitioner Parrish in May or June 2001 to understand USA-CCK's requirements for the following year. Ultimately, on July 11, 2001, Stewart forwarded to petitioner Parrish and then co-defendant Moran an e-mail with a draft bid and proposal that included AMS's confidential technical information and cost and pricing data. AMS marked this draft bid and proposal with a legend that restricted disclosure of the information to anyone outside the government.

After forwarding this e-mail, Stewart participated in a conference call from Virginia, U.S.A. with Colonel Moran and others at USA-CCK regarding the AMS proposal. After these negotiations, AMS

modified its proposal, and sent the revised bid via e-mail from Virginia to petitioner Parrish and co-defendant Colonel Moran on July 27, 2001. The bid and proposal submitted by AMS from the State of Virginia included its cost and pricing data for the contract. AMS also placed a restrictive legend on its bid and proposal, stating that the document should not be disclosed outside the government. This restrictive legend is designed to thwart others from utilizing AMS's proprietary information. AMS also requires its employees to sign agreements that they will not use AMS's proprietary information to compete against AMS. Petitioner Carlisle had executed such an agreement during his employment at AMS, a Virginia entity.

AMS did not include petitioner Carlisle as a recipient of the July 27, 2001 e-mail sent from Virginia containing the bid and proposal and cost and pricing data, nor did it include him in negotiations concerning the contract, as these were not part of his job requirements for AMS.

According to an analysis of e-mails taken from petitioner Carlisle's computer, Parrish forwarded AMS's bid and proposal and cost and pricing data to petitioner Carlisle on August 21, 2001.

After receiving AMS's bid and proposal and cost and pricing data sent from Virginia, Carlisle then used the information to create his own bid and proposal, which he submitted to USA-CCK on September 12, 2001. Carlisle's bid was cut and pasted from the

AMS proposal Carlisle had received from petitioner Parrish. Carlisle's bid showed that the document was originally created by AMS. Petitioner Carlisle's use of the AMS bid and proposal and cost and pricing data sent into Korea from Virginia violated his employment agreement with AMS, wherein he promised not to use such information for his personal gain.

Another company, ICT, submitted a bid and proposal with cost and pricing data to be considered for the award of the contract. ICT did not receive assistance from anyone at USA-CCK in preparing its bid. Access to AMS's bid and proposal and cost and pricing data when it prepared its bid would have given ICT a competitive advantage.

After the competing bids were received by USA-CCK, petitioner Parrish conducted the evaluation of the bids to make a recommendation concerning who should receive the contract. Based on his review, he recommended that the contract be awarded to petitioner Carlisle. On or about September 19, 2001, based on petitioner Parrish's recommendation, USA-CCK awarded contract DAJB03-01-C-0274, valued at $217,000 to petitioner Carlisle. Once again, whatever criminal violations of the United States Code occurred only between Korea and the State of Virginia, which under the Sixth Amendment, fixes federal venue in a District of Virginia. The Central District of California had zero criminal conduct occurring and a federal grand jury of the Central District of California

improperly returned the Indictment redacted as counts 1 and 2 of Appendix Exhibit "A".

REASONS FOR GRANTING PETITION FOR CERTIORARI TO RESOLVE:

1. Whether any jurisdiction in the subject indictment, Appendix "A", under the Sixth Amendment to the U.S. Constitution, is shown in the Central District of California to jury selection and empanelment for alleged crimes occurring in Asia in the Country of Korea between a District in Virginia?

2. Whether it is *plain error* in view of the Sixth Amendment to indict, try, and select a jury from the Central District of California for alleged crimes occurring between Asia, in the Country of Korea, and in a District of Virginia?

3. Whether the original panel of the Ninth Circuit failed to consider, and rule, on the *plain error* of trial in the Central District of California?

4. Whether, where the initial panel of the Ninth Circuit has found that Colonel Moran was "involved" in the offense within the meaning of U.S.S.G. 2C1.7(b)(1)(B) (2003) and where the initial panel found that Colonel Moran was an "official holding a high level decision-making or sensitive position," does this establish that the wrong-trier of fact has found a key fact that must have been submitted to the jury and found true beyond a reasonable doubt in order to apply an "eight level sentence enhancement"? See *United*

States v. Booker, 543 U.S. 220 (2005) (Hon. John Paul Stevens opinion).

5. Was ineffective assistance of counsel demonstrated by trial counsel's failure to object under the 6th Amendment to the eight-level enhancement imposed when the judge, not the jury, determined that Colonel Moran was an "official holding a high-level decision making or sensitive position," per item 3, initial opinion?

6. In view of the 5-Justice opinion of Hon. John Paul Stevens in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), holding that *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) applies to the U.S.S.G., does the 5-Justice opinion of the Hon. Stephen Breyer in *Booker*, supra, which holds that the U.S.S.G. are now only "advisory," and not mandatory, allow a U.S. District Judge to ignore a clear 6th Amendment issue and thus refuse to change a sentence elevation of 8 years imposed initially due to this 6th Amendment error and deprivation?

7. Does the En Banc ruling in *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005 En Banc) permit the allowing of a U.S. District Court to obviate and circumvent the 5-Justice ruling of the Hon. John Paul Stevens in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) under a theory that the U.S.S.G. are no longer mandatory but are now only "advisory"?

8. Unlike *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004) (Ameline I) and *United States v.*

Ameline, 400 F.3d 646 (9th Cir. 2005) (Ameline II), of both of which clearly speak to the rule of *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), does the failure of *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005 En Banc) to address the 6th Amendment command of *Blakely*, supra, allow U.S. Courts to ignore and fail to rule on a clear 6th Amendment issue under a theory that the U.S.S.G. are now only "advisory" and not mandatory?

9. Do the U.S.S.G. contain any area which explicated the 6th Amendment issue of *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) to allow any court to now ignore under the, "advisory" canopy, something which was mandated before *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)?

SUMMARY OF THE ARGUMENT

1. The indictment, and the redacted indictment of Appendix "A", both failed to charge any crime within the Central District of California; therefore juries from the Central District of California could not be impaneled to try these claimed crimes, and the Sixth Amendment rights of both petitioners were violated. All convictions must be reversed.

2. The "plain error rule" in view of the clear language of the 6th Amendment to the U.S. Constitution overcomes any failure to object to venue by failing to raise it below, and thus the initial panel

decision of Appendix "B" at paragraph 1, page 2 erroneously refused and failed to apply the "plain error" rule; reversal is here required.

3. Under U.S.S.G. 2C1.7(b)(1)(B), that provision did not apply to either petitioner since it must be shown that either petitioner occupied a "high-level decision-making position" and neither did; they obeyed instructions of Colonel Richard Moran rather than either petitioner initiating activity that solicited illegal activity; i.e., the requirement to apply 2C1.7 must follow from "bottom to top" in the echelon of command which did not here occur.

4. Colonel Moran was the only and appropriate "official holding a high-level decision-making or sensitive position," and only he could have been subjected to an eight-level sentence enhancement; neither of the petitioners should have been so subjected. The initial panel errs at Appendix "B" paragraph 2, page 2, and since this issue of fact was not submitted to the jury and found to be true beyond a reasonable doubt, each petitioner's eight-level enhancement must be nullified.

5. Under *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed.2d 403, 124 S. Ct. 2531 (June 24, 2004), the 2C1.7(b)(a)(B) issue was not submitted to the jury in this demanded trial by jury, and the jury failed to find true beyond a reasonable doubt this fact; the District Court can not so find de novo after conclusion of the trial. See Appendix "C".

6. The 5-Justice opinion authored by the Hon. John Paul Stevens in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)

commands that the decision *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed.2d 403, 124 S. Ct. 2531 (2004) be applied here, requiring that the jury, not the previous panel of the U.S. Court of Appeals determine beyond a reasonable doubt that U.S.S.G. 2C1.7(b)(1)(B)(2003) was met, and since that did not occur, the 8-level enhancement for both petitioners must be nullified.

7. Under *In Re Winship*, 397 U.S. 358, 364 (1970), petitioner Carlisle can not be convicted of the charges of count 11, original indictment which became count 2 of the redacted indictment; this conviction must be reversed.

8. The original panel errs at paragraph 4, page 3, of the slip opinion (Appendix "B") since Carlisle personally had to be a "present or former official of the United States," and Carlisle's conviction must be reversed as to this count.

ARGUMENT I

WITHIN THE REQUIREMENTS OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION, PETITIONERS MUST BE TRIED BY A JURY SELECTED FROM WHERE THE CRIME OCCURRED; NOTHING IN THIS CASE OCCURRED IN THE CENTRAL DISTRICT OF CALIFORNIA, AND THE INDICTMENT FAILED TO CHARGE OR AVER.

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to speedy and public

> trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

The indictment in this case, counts 10 and 11 and the redacted indictment wherein counts 10 and 11 are transmogrified into counts 1 and 2 (Appendix "A") clearly alleges criminal activity other than in the Central District of California, to wit, The Republic of Korea; yet it well appears that a jury from the Central District of California was impaneled to try this crime which was asserted to have occurred within the Republic of Korea.

The superseding indictment (Appendix "A") provides, inter alia that, in count one, "3. Defendant Richard L. Carlisle, RESIDING IN THE REPUBLIC OF KOREA, submitted a bid on the computer service contract under the name of Carlisle Consulting Company."

The "Objects of the Conspiracy" alleged that:

> "4. Beginning in or about July 2001 and continuing to or on or about September 25, 2001, IN THE REPUBLIC OF KOREA, defendants Richard J. Moran, Ronald A. Parrish, Richard L. Carlisle and others . . . conspired . . . to commit an offense against

> the United States . . . in violation of 41 U.S.C. 423."

Under "Overt Acts," it is asserted that:

> "9. In furtherance of the conspiracy and to accomplish the object of the conspiracy, defendants Richard J. Moran, Ronald A. Parrish, and Richard Carlisle committed various overt acts IN THE REPUBLIC OF KOREA . . ."

9a. alleges:

> "in or about July 2001, IN THE REPUBLIC OF KOREA defendant Moran solicited AMS . . ."

COUNT TWO reasserts paragraphs 1-8, and then paragraph 11 continues with:

> "11. On or about Auguest 21, 2001, IN THE REPUBLIC OF KOREA . . ."

and 12 avers that:

> "12. At the ABOVE TIME AND PLACE . . ."

Initially, a severe question arises whether this grand jury indictment returned by a California Federal Grand Jury is valid, for surely the indictment fails to allege criminal acts occurring within the Central District of California to allow a California federal trial jury to be impaneled to try this criminal case.

This conviction, of both petitioners, being in violation of the guarantees of the Sixth Amendment must, therefore, be reversed.

In parallel, it appears that the Fifth Amendment is also in violation insofar as the "indictment of the Grand Jury" clause is affected; neither petitioner was here in actual service in time of War or public danger, nor did this case arise under such auspices.

Any criminal defendant is entitled to rely on the indictment, which here fails to allege criminal acts within the Central District of California.

As such, these convictions and sentences to 18 months and 24 months, respectively, must be reversed.

On appeal, the initial panel of this circuit, ruling on June 14, 2005 (Appendix "B") at paragraph 1, page 2, stated:

> "Defendant waived their objection to venue by failing to raise it below. See *United States v. Johnson*, 297 F.3d 845, 861 (9th Cir. 2002)."

However, in view of the clear language of the 6th Amendment, which held that the "public trial must be before an impartial jury of the state and district wherein the crime shall have been committed . . . ," it is plain that venue could not be in California, and since this is plain error, a failure to raise the objection does not sound a death knell to petitioner's attack on the venue issue. See Rule 52 of F.R. Criminal Procedure.

Petitioners thus assert that their convictions must be reversed for error in venue.

ARGUMENT II

UNDER NEITHER OF THE SUBSECTIONS OF U.S.S.G. 2C1.7 COULD THE DISTRICT COURT AUGMENT THE SENTENCE OF EITHER PETITIONER BY 8 LEVELS; REDUCTION MUST BE ORDERED BY THIS U.S. SUPREME COURT.

U.S.S.G. 2C1.7 provides, in relevant areas:

2C1.7(b) SPECIFIC OFFENSE CHARACTERISTIC

(1) (If more than one applies, use the greater):

(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded $2,000.00, increase by the corresponding number of levels from the table in Section 2F1.1 (Fraud and Deceit) or

(B) If the offense involved an elected official or any official holding a high level decision making or sensitive position, increase by 8 levels.

Section 2F.1 would place the figure of $217,000.00, the contract planned to be awarded to petitioner Carlisle, in level (I) more than $200,000.00 (but less than (J) more than $350,000.00) at an increase of 8 levels. Thus whether the (A) and (B)

provisions were utilized, an 8 level increase would apply to petitioners.

The (A) provision is simply not applicable and in fact was not utilized by the District Court, who used only the (B) provision.

However, authority drawn from the relatively few U.S. Circuit Court cases that have applied the (A) provision illustrates why that provision does not here apply, i.e., it does not apply where, as here, Colonel Moran, in the position of power, merely directed petitioner Parrish to aid petitioner Carlisle in filling out an application to be considered for the contract.

When the directive occurred, Colonel Moran knew that AMS wanted $365,000.00 to perform the renewed one-year contract, and the Colonel believed the bid excessive; secondly, petitioner Carlisle had a track record of satisfactory performance on the computing work in Korea; thirdly, a chance for AMS to re-bid resulted in a decision of AMS to not further bid; and fourthly, the award of the contract need not be made to the lowest bidder, for expertise of a higher bidder can be, and here was, taken into account in the final award; i.e., low-bid alone is not, and was not, the sole criteria in making the award.

In truth, and in fact, the United States of America not only did not lose on the some $217,000.00 contract awarded to appellant Carlisle, but in fact, had it blossomed to fruition, the U.S. would have SAVED over $100,000.00 from the figure quoted by

AMS for its renewal, and, of course, further recognizing that AMS declined to re-bid.

While another bid was acquired, full recognition could be given to the superb track record of petitioner Carlisle who had performed well in his past year of service over a lesser bid or a company deemed not as qualified.

In any event, the government failed to introduce evidence that would allow a conclusion that Carlisle was awarded that contract other than for his demonstrated ability, and a substantial lowering ($365,000.00 - $217,000.00 = $148,000.00) below that of the AMS bid. In fact, the government failed to show great expertise in the unknown bidder, ICT, and its lower bid of $134,852.52 the first year, increasing to $142,100.68 the third year, could be rejected under a theory that a very low bid could portend a low performance.

Admittedly, U.S. Ninth Circuit law in this 2C1.7 guideline issue is sparse, but instruction and guidance is available from other circuits for the (A) category of 2C1.7.

For example, in *United States v. Antico*, 275 F.3d 245, 270-271 (3rd Cir. 2001), the Third Circuit continued its reasoning previously expounded in *United States v. Maurello*, 76 F.3d 1304 (3rd Cir. 1999) and *United States v. Hayes*, 242 F.3d 114 (3rd Cir. 2001). The Third Circuit ruled that "*actual loss or actual harm, as opposed to the defendant gain, was the*

appropriate basis for measuring the loss" (275 F.3d 245, 271).

As shown above, the United States can show no ACTUAL LOSS OR ACTUAL HARM since the award to Carlisle saved the government $148,000.00. Since the above authority eschews an examination on what Carlisle would receive, but instead focuses only on "actual loss or actual harm" to the United States, it is clear that neither petitioner could have been enhanced 8 levels under the (A) section of 2C1.7, even though the District Court DID NOT utilize the (A) section.

In fact, of course, the District Court used the (B) section and petitioners assert it to be likewise inapplicable since it would appear to govern if and only if either petitioner had initiated some sort of bribe directed toward Colonel Moran in an endeavor to convince this "official holding a high-level decision making position" to award the contract to Carlisle and thus deprive the government of savings it could have had had the bidding been open to all comers.

Indeed, this "bottom to top" influence was not present, but the efforts went from "top to bottom," i.e., Colonel Moran directing petitioner Parrish to aid petitioner Carlisle in filling out a bid for the computing contract. No "bribes" or other undue influence or corruptive persuasions were ever shown in this case.

Therefore, the 8 level enhancement does not apply in this case, and must be stricken, and each petitioner remanded for resentence.

ARGUMENT III

WITHIN THE MEANING OF *BLAKELY V. WASHINGTON*, 542 U.S. 296, 159 L.ED.2D 403, 124 S. CT. 2531 (JUNE 24, 2004) THE 8-LEVEL ENHANCEMENT CAN NOT BE ASSESSED AGAINST EITHER PETITIONER SINCE IN THIS DEMANDED TRIAL BY JURY, THE JURY DID NOT DETERMINE WHETHER THIS "OFFENSE" INVOLVED AN "ELECTED OFFICIAL OR ANY OFFICIAL HOLDING A HIGH-LEVEL DECISION MAKING OR SENSITIVE POSITION."

On June 24, 2004 the U.S. Supreme Court acted in *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed.2d 403, 124 S.Ct. 2531 (2004). This decision determined that sentencing enhancements could not be imposed by a judge absent the basis for the enhancement being submitted to the jury, and the jury so finding that fact that supported the enhancement.

Clearly, no defendant in this case, including Colonel Moran, were "elected officials" and it appears that whether U.S.S.G. 2C1.7(b)(1)B) applied or not was a factual issue for resolution by SOMEONE. Here that decision was made by the District Judge

and no submission was made to the jury for jury resolution in this demanded trial by jury.

Pursuant to *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and the 5-Justice opinion of Justice John Paul Stevens, the *Blakely* rule applies to the U.S.S.G. The 5-Justice Breyer opinion does not negate the command that *Blakely* applies.

Of course, the key fact which had to be resolved was whether the act of petitioner Parrish in merely aiding petitioner Carlisle in filling out an application for the computing contract, made at the request/order of Colonel Moran, and petitioner Carlisle making that application, in any way establish that this "offense" involved them as "high level decision-making" individuals; to punish under 2C1.7(b)(1)(B) clearly involved this factual determination, and here that factual determination was made by the wrong trier of fact, the U.S. District Judge.

The initial panel ruled, in place of the jury, in paragraph 3, page 2, (Appendix "B") that Colonel Moran was an "official holding a high level decision-making or sensitive position," thus requiring a jury-determination; while the original panel ruled the "objection was waived," *Blakely* was not the law when this case was tried, and one can not "waive" a right that was not then clearly explicated. *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004) (Ameline I) and *United States v. Ameline*, 400 F.3d 646 (9th Cir. 2005) (Ameline II).

Based on this new authority, the sentence enhancement under U.S.S.G. 2C1.7(b)(1)(B) cannot stand, and it must be set aside for this independent reason. See, of course, Argument II supra.

ARGUMENT IV

PETITIONER CARLISLE MUST BE REVERSED AS TO HIS CONVICTION OF COUNT 11 (COUNT 2) OF THE REDACTED INDICTMENT, FOR HE WAS NEVER "AT THE TIME THAT THE OFFENSE WAS COMMITTED A PRESENT OR FORMER OFFICIAL OF THE UNITED STATES" IN ELEMENT 1 OF THE ELEMENTS OF THE SECOND COUNT. *IN RE WINSHIP*, 397 U.S. 358, 364 (1970).

In Count 11 = Count 2 of the redacted indictment (see Appendix "A"), the government carried the burden of proving beyond a reasonable doubt the element of the charge that "at the time of commission of the offense petitioner Carlisle was a present or former official of the United States."

In fact, it surely is undisputed that Carlisle was never an employee or a present or former official of the United States, but was at the time these charged crimes occurred a civilian employee of AMS.

Under *In Re Winship*, 397 U.S. 358, 364 (1970), the government carries the burden of proving beyond a reasonable doubt each and every element of the charged crime and therefore the conviction of petitioner Carlisle on the second count must be reversed.

At paragraph 4, page 3, Appendix "B", the initial panel asserts guilt in Carlisle as an "aider and abettor," but under the charge here, he had to have personally been "a present or former official of the United States," which he was not. Thus the conviction on petitioner Carlisle on the second count must be reversed.

CONCLUSION

For any one of the key and de novo issues of this Petition, all raising important questions of federal law that has not been, but should be, settled by this court, Certiorari should be granted to the United States Court of Appeals for the Ninth Circuit.

Dated: September 10, 2007

Respectfully submitted,

RICARDO NICOL, ESQ.
400 West Fourth Street
Second Floor
Santa Ana, CA 92701
(714) 550-6644
Member of the Bar
Supreme Court of the
United States

ROGER S. HANSON, ESQ.*
1517 East Fourth Street
Santa Ana, CA 92701
(714) 953-0638
Member of the Bar
Supreme Court of the
United States

**Counsel of Record*
Attorneys for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

October 2001 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. RICHARD JAMES MORAN, RONALD ADAIR PARRISH, and RICHARD LEE CARLISLE Defendants.	NO. SA CR 02-174-AHS *REDACTED INDICTMENT* [18 U.S.C. § 371: Conspiracy; 41 U.S.C. § 423: Disclosure of Procurement Information; 18 U.S.C. § 2(a): Aiding and Abetting]

The Grand Jury charges:

COUNT ONE

[18 U.S.C. § 3711]

A. *INTRODUCTION*

1. As Commander of the USA-CCK, defendant RICHARD J. MORAN was responsible for oversight, approval, and execution of contracts that included contract DAJB03-01-C-0274 for computer services at the USA-CCK ("Computer Services Contract").

2. Defendant RONALD A. PARRISH was the Chief of the Contract Support Division at the USA-CCK, and had access to the bids received on the Computer Services Contract.

3. Defendant RICHARD L. CARLISLE, residing in the Republic of Korea, submitted a bid on the Computer Services Contract under the name of Carlisle Consulting Company.

B. *OBJECTS OF THE CONSPIRACY*

4. Beginning in or about July 2001 and continuing to on or about September 25, 2001, in the Republic of Korea, defendants RICHARD J. MORAN, RONALD A. PARRISH, RICHARD L. CARLISLE, and others known and unknown to the grand jury willfully conspired and agreed with each other to commit an offense against the United States, namely, to disclose and obtain contractor bid or proposal information prior to the award of the contract, in violation of Title 41 United States Code, Section 423.

5. The plan and purpose of this conspiracy was for defendants RICHARD J. MORAN and RONALD A. PARRISH to provide a competitive advantage to defendant RICHARD L. CARLISLE by disclosing to defendant RICHARD L. CARLISLE a competitor's bid or proposal information for the Computer Services Contract.

C. *MEANS BY WHICH THE OBJECTS OF THE CONSPIRACY WAS TO BE, ACCOMPLISHED*

The objects of the conspiracy were to be accomplished in substance as follows:

6. Defendant RICHARD J. MORAN would solicit bid or proposal information from a competing company seeking the Computer Services Contract.

7. Defendant RICHARD J. MORAN would direct defendant RONALD A. PARRISH to disclose the bid or proposal information of the competing company to defendant RICHARD L. CARLISLE.

8. Defendant RICHARD L. CARLISLE would receive the bid or proposal information of the competing company and use it in the preparation of his bid for the Computer Services Contract.

D. *OVERT ACTS*

9. In furtherance of the conspiracy and to accomplish the object of the conspiracy, defendants RICHARD J. MORAN, RONALD A. PARRISH and RICHARD L. CARLISLE committed various overt acts in the Republic of Korea, including but not limited to the following:

a. In or about July 2001, in the Republic of Korea, defendant RICHARD J. MORAN solicited American Management Systems, Inc., the incumbent contractor, to bid on the next year's Computer Services Contract.

b. In or about August 2001, defendant RICHARD J. MORAN directed defendant RONALD A. PARRISH to disclose the bid and proposal information received from American Management Systems, Inc. to defendant RICHARD L. CARLISLE.

c. On or about August 21, 2001, defendant RONALD A. PARRISH sent an electronic message to defendant RICHARD L. CARLISLE, to which defendant PARRISH attached the bid and proposal information received from American Management Systems, Inc.

d. On or about August 21, 2001, defendant RICHARD L. CARLISLE received the bid and proposal information of American Management Systems, Inc.

e. On or about September 12, 2001, defendant RICHARD L. CARLISLE submitted his bid for the Computer Services Contract.

COUNT TWO

[41 U.S.C. § 423(a); 18 U.S.C. § 2(a)]

A. *INTRODUCTION*

10. Paragraphs 1 through 8 of this Indictment are re-alleged and incorporated by reference as though set forth in full.

B. *PROCUREMENT INTEGRITY ACT VIOLATION*

11. On or about August 21, 2001, in the Republic of Korea, defendants RICHARD J. MORAN and RONALD A. PARRISH, officials of the United States, assisting with the award of a Federal agency procurement, aiding and abetting each other, knowingly disclosed contractor bid or proposal information prior

to the award of the contract, namely, the bid and proposal information of American Management Systems, Inc.

12. At the above time and place, defendant RICHARD L. CARLISLE aided, abetted, counseled, induced and procured the [illegible] of the offense alleged above.

A TRUE BILL

_____

Foreperson

DEBRA W. YANG
United States Attorney

JOHN S. GORDON
Assistant United States Attorney
Chief, Criminal Division

JOHN C. HUESTON
Assistant United States Attorney
Chief, Santa Ana Branch Office

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. **RONALD ADAIR PARRISH,** Defendant-Appellant.	No. 03-50408 D.C. No. CR-02-00174-AHS-3 **MEMORANDUM*** (Filed Jun. 14, 2005)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. **RICHARD LEE CARLISLE, JR., a/k/a Richard Lee Carlisle; Ricard Carlisle; Richard Carlisle; "Rick"; and "Ricky",** Defendant-Appellant.	No. 03-50410 D.C. No. CR-02-00174-AHS-4

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Submitted January 11, 2005**
Submission vacated January 14, 2005
Resubmitted June 14, 2005
Pasadena, California

Before: **REINHARDT**, **KOZINSKI** and **CLIFTON**, Circuit Judges.

1. Defendants waived their objection to venue by failing to raise it below. *See United States* v. *Johnson,* 297 F.3d 845, 861 (9th Cir. 2002).

2. Col. Moran was "involved" in the offense within the meaning of U.S.S.G. § 2C1.7(b)(1)(B) (2003). Because Moran was an "official holding a high-level decision-making or sensitive position," *id.*, defendants' eight-level sentence enhancement was proper. *See United States* v. *Edwards,* 188 F.3d 230, 238 (4th Cir. 1999).

3. The judge, not the jury, determined that Col. Moran was an "official holding a high-level decision-making or sensitive position." However, defendants did not raise a Sixth Amendment objection, *see United States* v. *Booker,* 125 S.Ct. 738 (2005), below. Consistent with our recent en banc opinion in *United States* v. *Ameline,* No. 02-30326, slip op. at 14-15 (9th

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** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Cir. June 1, 2005), we hold that a "limited remand to the district court is appropriate for the purpose of ascertaining whether the sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory." *Id.* at 3.

4. The jury was properly instructed and had sufficient evidence to convict defendant Carlisle of aiding and abetting a violation of 41 U.S.C. § 423. *See United States* v. *Cordova Barajas,* 360 F.3d 1037, 1041 (9th Cir. 2004); *United States* v. *Smith,* 891 F.2d 703, 710-11 (9th Cir. 1989).

AFFIRMED IN PART; REMANDED IN PART.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD ADAIR PARRISH, Defendant-Appellant.	No. 06-50060 D.C. No. CR-02-00174-AHS-3 MEMORANDUM* (Filed May 1, 2007)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICHARD LEE CARLISLE, Defendant-Appellant.	No. 06-50063 D.C. No. CR-02-00174-AHS-4

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Submitted February 15, 2007**
Pasadena, California

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: CANBY and THOMAS, Circuit Judges, and CONLON,*** District Judge.

In a previous appeal, this court affirmed the convictions of Ronald Adair Parrish and Richard Lee Carlisle Jr., and remanded pursuant to *United States v. Ameline,* 409 F.3d 1073 (9th Cir. 2005) (en banc). *United States v. Parrish,* 134 Fed. Appx. 183 (9th Cir. 2005). In this appeal, Parrish and Carlisle raise the same issues presented in their first appeal. With the exception of their sentences, which are reviewed for reasonableness under *Ameline,* 409 F.3d at 1079, this court declines to reconsider issues decided in the prior appeal. *United States v. Scrivner,* 189 F.3d 825, 827 (9th Cir. 1999) (under the law of the case doctrine, one appellate panel generally will not reconsider questions decided by another panel on a prior appeal in the same case). This court also declines to consider their ineffective assistance of counsel claim because it is not supported by any argument. Fed. R. App. P. 28(a)(9); *United States v. Williamson,* 439 F.3d 1125, 1138 (9th Cir. 2006).

On limited remand, the district judge considered the sentencing guidelines and the 18 U.S.C. § 3553(a) factors; she concluded the previously imposed sentences would not have differed materially had the guidelines been advisory at the time of the original

*** The Honorable Suzanne B. Conlon, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

sentencing. *Ameline,* 409 F.3d at 1079. The record clearly shows the district judge properly took into account the non-mandatory nature of the guidelines and understood the full scope of her discretion. *United States v. Combs,* 470 F.3d 1294, 1297 (9th Cir. 2006). We reject the contention that the Sixth Amendment barred the district court from determining facts supporting a sentencing enhancement. *United States v. Booker,* 543 U.S. 220, 259 (2005); *Ameline,* 409 F.3d at 1077-78. We conclude the sentences are reasonable. *See Combs,* 470 F.3d at 1297 (a sentence is reasonable if "the district judge properly understood the full scope of his discretion in a post-*Booker* world").

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD ADAIR PARRISH, Defendant-Appellant.	No. 06-50060 D.C. No. CR-02-00174-AHS-3 Central District of California, Santa Ana ORDER (Filed Jun. 22, 2007)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICHARD LEE CARLISLE, Defendant-Appellant.	No. 06-50063 D.C. No. CR-02-00174-AHS-4 Central District of California, Santa Ana

Before: CANBY and THOMAS, Circuit Judges, and CONLON,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Thomas voted to reject the suggestion for rehearing en banc and Judges Canby and Conlon so recommended.

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* The Honorable Suzanne B. Conlon, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.